



SUPREME COURT OF THE UNITED STATES.

No. 460.—OCTOBER TERM, 1920.

Victor L. Berger, et al.,	} On a Certificate from the	
vs.		United States Circuit Court
The United States of America.		of Appeals for the Seventh Circuit.

[January 31, 1921.]

Mr. Justice McKENNA delivered the opinion of the Court.

Section 21 of the Judicial Code provides as follows:

"Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists. . . . No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

February 2, 1918, there was returned into the District Court of the United States for the Northern District of Illinois, an indictment against plaintiffs in error (it will be convenient to refer to them as defendants), charging them with a violation of the Act of Congress of June 15, 1917, known as the Espionage Act, ch. 30, 40 Stat. 217.* In due time they invoked Section 21 by filing an

*"Whoever when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, shall be punished. . . ."

affidavit charging Judge Landis, who was to preside at the trial, with personal bias and prejudice against them, and moved for the assignment of another judge to preside at the trial. The motion was denied and upon the trial defendants were convicted and each sentenced to twenty years' imprisonment. From the judgment and sentence they took the case to the United States Circuit Court of Appeals for the Seventh Circuit. That court reciting that certain questions of law under Section 21 have arisen upon the affidavit and motion upon which the court is in doubt and upon which it desires the advice and instructions of this court, certifies questions of the sufficiency of the affidavit and the duty of the judge thereunder, and also certifies the affidavit and other proceedings upon such motion.

The affidavit, omitting formal and unnecessary parts, is as follows: Petitioners (defendants) represent "that they jointly and severally verily believe that His Honor Judge Kenesaw Mountain Landis has a personal bias and prejudice against certain of the defendants, to wit: Victor L. Berger, William F. Kruse and Adolph Germer, defendants in this cause, and impleaded with J. Louis Engdahl and Irwin St. John Tucker, defendants in this case. That the grounds for the petitioners' beliefs are the following facts: That said Adolph Germer was born in Prussia, a state or province of Germany; that Victor L. Berger was born in Rehback, Austria; that William F. Kruse is of immediate German extraction; that said Judge Landis is prejudiced and biased against said defendants because of their nativity, and in support thereof the defendants allege, that, on information and belief, on or about the 1st day of November said Judge Landis said in substance: 'If anybody has said anything worse about the Germans than I have I would like to know it so I can use it.' And referring to a German who was charged with stating that 'Germany had money and plenty of men and wait and see what she is going to do to the United States,' Judge Landis said in substance: 'One must have a very judicial mind, indeed, not to be prejudiced against the German Americans in this country. Their hearts are reeking with disloyalty. This defendant is the kind of a man that spreads this kind of propaganda and it has been spread until it has affected practically all the Germans in this country. This same kind of excuse of the defendant offering to protect the German people is the same kind of excuse offered by the pacifists in this country, who are against the United States and have the interests

of the enemy at heart by defending that thing they call the Kaiser and his darling people. You are the same kind of a man that comes over to this country from Germany to get away from the Kaiser and war. You have become a citizen of this country and lived here as such, and now when this country is at war with Germany you seek to undermine the country which gave you protection. You are of the same mind that practically all the German-Americans are in this country, and you call yourselves German-Americans. Your hearts are reeking with disloyalty. I know a safeblower, he is a friend of mine, who is making a good soldier in France. He was a bank robber for nine years, that was his business in peace time, and now he is a good soldier, and as between him and this defendant, I prefer the safeblower'.

"These defendants further aver that they have at no time defended the Kaiser, but on the contrary they have been opposed to an autoeracy in Germany and every other country; that Victor L. Berger, defendant herein, editor of the Milwaukee Leader, a Socialist daily paper; Adolph Germer, National Secretary of the Socialist party; William F. Kruse, editor of the Young Socialists Magazine, a Socialist publication; and J. Louis Engdahl disapproved the entrance of the United States into this war.

"Your petitioners further aver that the defendants Tucker and Engdahl were born in the United States and were not born in enemy countries, and are not immediate descendants of persons born in enemy countries, but verily believe because they are impleaded with Berger, Kruse and Germer that they as well as Berger, Germer and Kruse can not receive a fair and impartial trial, and that the prejudice of said Judge Landis against said Berger, Germer and Kruse would prejudice the defense of said defendants Tucker and Engdahl impleaded in this case."

The affidavit was accompanied by the certificate of Seymour Stedman, attorney for defendants, that the affidavit and application were made in good faith.

The questions certified are as follows:

(1) Is the aforesaid affidavit of prejudice sufficient to invoke the operation of the Act which provides for the filing of affidavit of prejudice of a judge?

(2) Did said Judge Landis have the lawful right to pass upon the sufficiency of the said affidavit of his prejudice, or upon any question arising out of the filing of said affidavit?

(3) Upon the filing of the said affidavit of prejudice of said Judge Landis, did the said Judge have lawful right and power to preside as judge on the trial of plaintiffs in error upon said indictment?

The basis of the questions is Section 21, and the primary question under it is the duty and power of the judge, whether the filing of an affidavit of personal bias or prejudice compels his retirement from the case or whether he can exercise a judgment upon the facts affirmed and determine his qualification against them and the belief based upon them?

These alternatives present the contentions in the case. Defendants contend for the first; the United States contends for the second. The assertion of defendants is that the mandate of the section is not subject to the discretion or judgment of the judge. The assertion of the United States is that the motion and its supporting affidavit, like other motions and their supporting evidence, are submitted for decision and the exercise of the judicial judgment upon them. In other words, the action of the affidavit is not "automatic" to quote the Solicitor General, but depends upon the substance and merit of its reasons and the truth of its facts, and upon both the judge has jurisdiction to pass. The issue is, therefore, precise, and while not in broad compass is practically of first impression as now presented.

In *Glasgow v. Moyer*, 225 U. S. 420, the section was referred to but not passed upon. In *Ex parte American Steel Barrel Company*, 230 U. S. 35, the phase of the section presented here was not presented. There proceedings in bankruptcy had progressed to a decree of adjudication, and the judge who had conducted them was charged by certain creditors with bias and prejudice based on his rulings in the case. Such use of Section 21 was disapproved. "It was never intended", it was said, "to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause." As pertinent to the comment and of the meaning of Section 21, we may say, that Judge Chatfield against whom the affidavit was directed, said that he felt that the intention of Section 21 was "to cause a transfer of the case without reference to the merits of the charge of bias", and he did so immediately, in order, as he said, "that the application of the creditors" might "be considered as speedily as possible by such judge as" might "be designated." Another judge was designated and

to restrain action by the latter and vacate the orders that he had made, and to command Judge Chatfield to resume jurisdiction, mandamus was sought. It was denied. The case establishes that the bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case.

The cases at circuit in which Section 21 was considered have not much guidance. They, however, deserve attention. *Ex Parte N. K. Fairbank Company*, 194 Federal 978, may be considered as expressing power in the presiding judge to pass upon the sufficiency of the facts affirmed. In *Ex parte Glasgow*, 195 Fed. 780, the question came up upon an application for a writ of *habeas corpus* and it appeared that the affidavit of bias was not filed until after trial of the case and when the court was about to pass upon a motion in arrest of judgment and new trial. It was held that Section 21 was not applicable at such stage of the proceedings. *Henry v. Speer*, 201 Fed. 869, was a petition for mandamus to require an affidavit of bias against District Judge Speer to be certified to the senior circuit judge that the latter might determine its sufficiency, and to restrain Judge Speer from exercising jurisdiction of the case. The writ was refused on the ground that the affidavit did not conform to Section 21 in that it omitted to charge "personal" bias, a charge of such bias, it was held, being a necessary condition. The court (Circuit Court of Appeals for the Fifth Circuit) by Judge Meek, said, "Upon the making and filing by a party of an affidavit under the provisions of Section 21, of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient then he has no other or further duty to perform than that prescribed in Section 20 of the Judicial Code. He is relieved from the delicate and trying duty of deciding upon the question of his own disqualification." This comment sustains defendants' view of Section 21 and marks a distinction between determining the legal sufficiency of the affidavit and passing upon the truth of its statements, a distinction to which we shall presently advert.

The cases (one being excepted) to the extent they go, militate against the contention of the Government and they have confirmation in the words of the section. Their declaration is that "whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice

either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated . . . to hear such matter." There is no ambiguity in the declaration and seemingly nothing upon which construction can be exerted—nothing to qualify or temper its words or effect. It is clear in its permission and direction. It permits an affidavit of personal bias or prejudice to be filed and upon its filing, if it be accompanied by certificate of counsel, directs an immediate cessation of action by the judge whose bias or prejudice is averred, and in his stead, the designation of another judge. And there is purpose in the conjunction; its elements are complements of each other. The exclusion of one judge is emphasized by the requirement of the designation of another.

But it is said that there is modification of the absolutism of the quoted declaration in the succeeding provision that the "affidavit shall state the facts and reasons for the belief" of the existence of the bias or prejudice. It is urged that the purpose of the requirement is to submit the reality and sufficiency of the facts to the judgment of the judge and their support of the averment or belief of the affiant. It is in effect urged that the requirement can have no other purpose, that it is idle else, giving an automatism to the affidavit which overrides everything. But this is a misunderstanding of the requirement. It has other and less extensive use as pointed out by Judge Meek in *Henry v. Speer*, *supra*. It is a precaution against abuse, removes the averments and belief from the irresponsibility of unsupported opinion, and adds to the certificate of counsel the supplementary aid of the penalties attached to perjury. Nor do we think that this view gives room for frivolous affidavits. Of course the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment. The affidavit of defendants has that character. The facts and reasons it states are not frivolous or fanciful but substantial and formidable and they have relation to the attitude of Judge Landis' mind toward defendants.

It is, however, said, that the assertion and the facts are stated on information and belief and that hence the affidavit is wholly insufficient, Section 21 requiring facts to be stated "and not merely belief". The contention is that "the court is expected to act on the affidavit itself" and that, therefore "the Act of Congress requires facts—not opinions, beliefs, rumors or gossip."

Ex parte American Steel Barrel Company, supra, is cited for the contention. We do not know what counsel means by "opinions, beliefs, rumors or gossip". The belief of a party the section makes of concern and if opinion be nearer to or farther from persuasion than belief, both are of influence and universally regarded as of influence in the affairs of men and determinative of their conduct, and it is not strange that Section 21 should so regard them.

We may concede that Section 21 is not fulfilled by the assertion of "rumors or gossip" but such disparagement cannot be applied to the affidavit in this case. Its statement has definite time and place and character, and the value of averments on information and belief in the procedure of the law is recognized. To refuse their application to Section 21 would be arbitrary and make its remedy unavailable in many, if not in most cases. The section permits only the affidavit of a party, and *Ex parte American Steel Barrel Company, supra*, decides, that it must be based upon facts antedating the trial, not those occurring during the trial. In the present case the information was of a definite incident, and its time and place were given. Besides, it cannot be the assumption of Section 21 that the bias or prejudice of a judge in a particular case would be known by everybody, and necessarily, therefore, to deny to a party the use of information received from others is to deny to him at times the benefit of the section.

We are of opinion, therefore, that an affidavit upon information and belief satisfies the section and that upon its filing, if it show the objectionable inclination or disposition of the judge, which we have said is an essential condition, it is his duty to "proceed no further" in the case. And in this there is no serious detriment to the administration of justice nor inconvenience worthy of mention, for of what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside, and any serious delay of trial is avoided by the requirement that the affidavit must be filed not less than ten days before the commencement of the term.

Our interpretation of Section 21 has therefore no deterring consequences, and we cannot relieve from its imperative conditions upon a dread or prophecy that they may be abusively used. They can only be so used by making a false affidavit and a charge of, and the penalties of perjury restrain from that—perjury in him who makes the affidavit, connivance therein of counsel thereby sub-

jecting him to disbarment. And upon what inducement and for what achievement—no other than trying the case by one judge rather than another, neither party or counsel having voice or influence in the designation of that other; and the section in its care permits but "one such affidavit."

But if we concede, out of deference to judgments that we respect, a foundation for the dread, a possibility to the prophecy, we must conclude Congress was aware of them and considered that there were countervailing benefits. At any rate we can only deal with it as it is expressed and enforce it according to its expressions. Nor is it our function to approve or disapprove it, but, we may say, that its solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free, to use the words of the section, from any "bias or prejudice" that might disturb the normal course of impartial judgment. And to accomplish this end the section withdraws from the presiding judge a decision upon the truth of the matters alleged. Its explicit declaration is that upon the making and filing of the affidavit, the judge against whom it is directed "shall proceed no further therein, but another judge shall be designated in the manner prescribed in Section 23 to hear such matter". And the reason is easy to divine. To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial and if prejudice exist it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.

After overruling the motion of plaintiffs for his displacement Judge Landis permitted to be filed a stenographic report of the incident and language upon which the motion was based. We, however, have not discussed it because under our interpretation of Section 21 it is excluded from consideration.

We come then to the questions certified and to the first we answer Yes, that is that the affidavit of prejudice is sufficient to invoke the operation of the Act. To the second we answer that to the extent we have indicated, Judge Landis had a lawful right to pass upon the sufficiency of the affidavit. To the third we answer No, that is, that Judge Landis had no lawful right or power to preside as Judge on the trial of defendants upon the indictment.

So ordered.

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Court of Appeals for the
Seventh Circuit.

[January 31, 1921.]

Mr. Justice DAY, dissenting.

As this case is to settle the practice for this and similar cases which may arise in the Federal courts, and as the opinion does not consider some aspects of the record, I venture to state the reasons which impel me to reach a different conclusion than that announced by the majority.

An examination shows that statutes exist in a number of States covering the subject under consideration. These statutes vary in character, and in the requirements for establishing the bias or prejudice of the judge which may require him to abstain from sitting at the trial of a particular case. In some of them an affidavit of belief of prejudice, or that a fair trial cannot be had before a particular Judge, is sufficient to disqualify him. Other statutes require supporting affidavits and the certificate of counsel, and provide for a hearing on the matter of disqualification. In some States the matter is required to be heard before another judge.

The Federal Statute, now under consideration, had its origin in an amendment to the Judicial Code, introduced in the House of Representatives when the adoption of the Code was under consideration. As adopted in the House, the affidavit was required to set forth the reasons for the belief that personal bias or prejudice existed against the party, or in favor of the opposite party to the suit. (See Congressional Record, Vol. 46, part 3, p. 2626, *et seq.*)

When the bill came before the Senate the section was amended so as to require the facts, and the reasons for the belief that bias or prejudice existed, to be set forth, and the affidavit is required to be accompanied by a certificate of counsel of record that it and the application are made in good faith. (Senate Document, No. 848, 61st Congress, 3d Session.) It is thus apparent

that the section in the form in which it finally became part of the Judicial Code intended that the bias or prejudice which should disqualify a judge should be personal against the objecting party, and that it should be established by an affidavit which should set forth the reasons and facts upon which the charge of bias or prejudice was based. The evident purpose of this requirement was to require a showing of such reasons and facts as would prevent imposition upon the court, and establish the propriety of the affidavit of disqualification. "It is not sufficient", said the late Mr. Justice Brewer, when a member of the Supreme Court of Kansas, in *City of Emporia v. Volmer*; 12 Kan. 627, "that a prima facie case only be shown, such a case as would require the sustaining of a challenge to a juror. It must be strong enough to overthrow the presumption in favor of the trial judge's integrity and of the clearness of his perceptions."

I accept the opinion of the majority that the judge under the requirements of this statute may pass upon the sufficiency of the affidavit, subject to a review of his decision by an appellate court, and if it be sufficient to show personal bias and prejudice, the judge should not try the case. But I am unable to agree that in cases of the character now under consideration the statement of the affidavit, however unfounded, must be accepted by the judge as a sufficient reason for his disqualification, leaving the vindication of the integrity and independence of the judge to the uncertainties and inadequacy of a prosecution for perjury if it should appear that the affidavit contains known misstatements.

Notwithstanding the filing of the affidavit purporting compliance with the statute, the court has a right to use all reasonable means to protect itself from imposition. *Davis et al. v. Rivers et al.*, 49 Iowa 435. The personal bias or prejudice of the Judge against the defendants in this case is said to be established by language imputed to the Judge as his utterances concerning the attitude of the German people during the progress of the war.

The affidavit filed contained a statement of alleged language of the Judge, concerning a German who was "charged" with making the statements set forth. Upon receiving the affidavit the Judge at once inquired of counsel whether the language ascribed to him was not in fact uttered in connection with the disposition of the case of United States against one Weismensell in sentencing him after conviction by a jury of a violation of the Espionage Act in the same court. Counsel informed the Judge that such was

the fact. The Judge asked counsel for Berger whether he had made any effort to ascertain the accuracy of the statement alleged to have been made by the court. Counsel replied that he had not. It would seem incredible that any judge could have made such statements concerning a defendant not yet tried in his court, in advance of trial and upon a mere charge of an offense. Counsel in open court admitted that the offending language was used in passing sentence after conviction in Weimensell's case.

Moreover, upon the affidavit being filed, and after this admission of counsel, the District Attorney offered in evidence a transcript of what took place and what was in fact said upon the sentencing of Weimensell. The Judge permitted this stenographic report, sworn to by an experienced stenographer, who made it, to be a true and correct report of the statements made and the proceedings had, to be put into the record, saying that the truth should be shown of record in connection with the falsity, although he was of opinion that the facts stated in the affidavit failed to establish bias or prejudice against the defendants which would disqualify him from sitting at the trial.

This stenographic report, sent up with the certificate and made part of it, and which there is no reason to believe fails to state accurately what took place, is in marked contrast with statements of the affidavit which the defendants made when seeking the disqualification of the Judge. It shows, as we have already stated, that the utterances of the Judge were after conviction of Weimensell, and were made when he was passing sentence. It shows that the statement of the Judge concerning German-Americans was quite different from that stated in the affidavit, and referred to the type of man who had been convicted and was before him for sentence. The Judge in speaking of the convicted defendant said that he was of the type of man who branded almost the whole American-German population, and that one German-American, such as the defendant, talking such stuff did more damage to his people than thousands of them could overcome by being good and loyal citizens; and that he, the defendant, was an illustration of the occasional American of German birth whose conduct had done so much to damn the whole ten million in America. While this language might have been more temperate, there does not appear to be in it anything fairly establishing that the Judge directed his observations at the German people in general, but rather that his remarks were aimed at one convicted as was the defendant, of violation of law.

As I understand the opinion of the court, notwithstanding the admissions of counsel, and the sworn stenographic report of what

took place, the affidavit must be accepted, and if it discloses matters, which if true, would tend to establish bias and prejudice, the same must be given effect and the Judge be disqualified. It does not seem to me that this conclusion comports with the requirements of the statute that reasons and facts must be set forth for the consideration of the judge. It places the Federal courts at the mercy of defendants who are willing to make affidavits as to what took place at previous trials in the court, which the knowledge of the judge, and the uncontradicted testimony of an official report may show to be untrue, and in many districts may greatly retard the trial of criminal causes.

While, as I have said, in sentencing Weissensell the Judge might have been more temperate in his observations, I am unable to find that the statements of the affidavit when read in connection with the admissions of counsel, and the established facts as to what took place as gathered from the stenographic report, showed such evidence of personal bias or prejudice against the defendants as required the Judge upon the mere filing of this affidavit to permit its misleading statements to be placed of record, and to proceed no further with the case.

It does not appear that the trial judge had any acquaintance with any of the defendants, only one of whom was of German birth, or that he had any such bias or prejudice against any of them as would prevent him from fairly and impartially conducting the trial. To permit an *ex parte* affidavit to become in effect a final adjudication of the disqualification of a judge when facts are shown, such as are here established, seems to me to be fraught with much danger to the independent discharge of duties by Federal judges, and to open a door to the abuse of the privilege which is intended to be conferred by the statute in question.

In my judgment the questions propounded, in the light of the disclosures of this record, should be answered as to the first: That the affidavit of prejudice, when read in the light of the other disclosures in the record, was insufficient to meet the requirements of the act. As to the second: That while the Judge might have called upon another judge to pass upon the sufficiency of the affidavit, he had jurisdiction to pass upon it himself if he saw fit to do so. As to the third: That the mere filing of the affidavit did not require the Judge to proceed no further with the trial of the defendants upon the accusation against them.

Mr. Justice PITNEY concurs in this dissent.

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[January 31, 1921.]

Mr. Justice McREYNOLDS, dissenting.

I am unable to follow the reasoning of the opinion approved by the majority or to feel fairly certain of its scope and consequence. If an admitted anarchist charged with murder should affirm an existing prejudice against himself and specify that the judge had made certain depreciatory remarks concerning all anarchists, what would be the result? Suppose official stenographic notes or other clear evidence should demonstrate the falsity of an affidavit, would it be necessary for the judge to retire? And what should be done if dreams or visions were the basis of an alleged belief?

The conclusion announced gives effect to the statute which seems unwarranted by its terms and beyond the probable intent of Congress. Bias and prejudice are synonymous words and denote "an opinion or leaning adverse to anything without just grounds or before sufficient knowledge"—a state of mind. The statute relates only to adverse opinion or leaning towards an individual and has no application to the appraisalment of a class, *e. g.*, revolutionists, assassins, traitors.

To claim personal bias without more is insufficient; "the facts and the reasons for the belief that such bias or prejudice exists" must be set out, and plainly, I think, this must be done in order that the judge or any reviewing tribunal may determine whether they suffice to support honest belief in the disqualifying state of mind.

Defendants' affidavit discloses no adequate ground for believing that personal feeling existed against any one of them. The indicated prejudice was towards certain malevolents from Ger-

many, a country then engaged in hunnish warfare and notoriously encouraged by many of its natives who, unhappily, had obtained citizenship here. The words attributed to the judge (I do not credit the affidavit's accuracy) may be fairly construed as showing only deep detestation for all persons of German extraction who were at that time wickedly abusing privileges granted by our indulgent laws.

Of course, no judge should preside if he entertains actual personal prejudice towards any party and to this obvious disqualification Congress added honestly entertained belief of such prejudice when based upon fairly adequate facts and circumstances. Intense dislike of a class does not render the judge incapable of administering complete justice to one of its members. A public officer who entertained no aversion towards disloyal German immigrants during the late war was simply unfit for his place. And while "An overspeaking judge is no well tuned cymbal" neither is an amorphous dummy unspotted by human emotions a becoming receptacle for judicial power. It was not the purpose of Congress to empower an unscrupulous defendant seeking escape from merited punishment to remove a judge solely because he had emphatically condemned domestic enemies in time of national danger. The personal concern of the judge in matters of this kind is indeed small, but the concern of the public is very great.

In my view the trial judge committed no error when he considered the affidavit, held it insufficient, and refused to retire.

